In the Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 246.

ALBERT SCHEFFER, GEORGE R. FINCH, and CHARLES N. NELSON, executors of CHARLES SCHEFFER, deceased, Plaintiffs in Error,

vs.

THE WASHINGTON CITY, VIRGINIA MIDLAND and GREAT SOUTHERN RAILROAD COMPANY.

BRIEF FOR PLAINTIFFS IN ERROR.

JOHN B. SANBORN,
CHARLES KING,
GEORGE A. KING,
Attorneys and Counsel for Plaintiffs in Error.

WASHINGTON, D. C.:
1882.

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BRIEF FOR PLAINTIFFS IN ERROR.

I.—STATEMENT OF THE CASE.

This case comes before the Court by a writ of error to the Circuit Court of the United States for the Eastern District of Virginia. The action was brought by the plaintiffs in error against the defendant in error, for negligently causing the death of their testator. The case was heard below upon a general demurrer of the defendant to the declaration. On that demurrer final judgment was entered for the defendant. This is the judgment now to be reviewed by this court. The sole question, therefore, to be considered, is, the sufficiency in law of the declaration.

The declaration avers that the deceased, Charles Scheffer, on the 6th day of December, 1874, became and was a sleeping car passenger on the defendant's line of railroad, to be conveyed from Lynchburg, Va., to Alexandria, Va., and Washington, D. C. It furthers alleges that on the 7th day of December, 1874, in the night time, a collision occurred, owing to the negligence of the company's servants and officers, "by

means whereof the said Charles Scheffer was cut, bruised, maimed, and disfigured, wounded, lamed and injured about his head, face, neck, back, and spine, and by reason whereof the said Charles Scheffer became and was sick, sore, lame, and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unendurable evils to come upon him the said Charles Scheffer were produced and caused upon the brain and mind of him the said Charles Scheffer, which disease so produced as aforesaid baffled all medical skill, and continued constantly to disturb, harass, annoy, and prostrate the nervous system of him the said Charles Scheffer, to wit, from the seventh day of December, A. D. 1874, to the eighth day of August, 1875, when said phantasms, illusions, and forebodings produced as aforesaid overcame and prostrated all his reasoning powers, and induced him the said Charles Scheffer to take his life in an effort to avoid said phantasms, illusions, and forebodings, which he then and there did, whereby and by means of the careless, unskilful, and negligent acts of the said defendant aforesaid the said Charles Scheffer, to wit, on the eighth day of August, 1875, lost his life and died," &c.

If, on the above state of facts, the action can be maintained, the judgment must be reversed; otherwise, it must be affirmed.

II.—Assignment of Error.

The plaintiffs in error hereby assign for error, that the court below sustained the demurrer of the defendant to the declaration, and rendered judgment thereon for said defendant, whereas, said declaration was, on the contrary, in all respects, sufficient in law, and the demurrer thereto ought to have been overruled, and judgment ought to have been rendered for the plaintiffs.

III.—Brief.

The statute of Virginia, by virtue of which this suit is brought, is as follows:

"*When suit may be maintained on account of death occasioned by wrongful act of another.*

"7. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured, or if she be a married woman, her husband, either separately or together with her, to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony: provided, that in no case shall the recovery exceed the sum of ten thousand dollars.

"*How such actions may be brought; damages, how awarded and paid.*

"8. Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve calendar months after his or her death. The jury in any such action may award such damages as to it may seem fair and just, and may direct in what proportion they shall be distributed to the wife, husband, parent, and child of the deceased.

"9. The amount recovered in any such action shall, after the payment of costs and reasonable attorney's fees, be paid to the wife, husband, parent, and child of the deceased, in such proportion as the jury may have directed, or if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent, or child, the amount so received shall be assets in the hands of the personal representatives, to be disposed of according to law.

"*Death of defendant not to determine right of action.*

"10. Rights of action under this act shall not determine,

nor shall such actions, when brought, abate, by the death of the defendant."

Code of Virginia, 1873, p. 996, Chap. 145, "Of Actions for Injuries."

No opinion was delivered by the learned Judge who decided the cause in the court below. The ground of the decision, however, was understood to be that the collision on the railroad was too remote a cause of the death.

It is respectfully submitted that in this there was error.

"Negligence, in its civil relations, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as produces, in an ordinary and natural sequence, a damage to another."

Wharton on Negligence, 3.

But the negligence, in order to be actionable, must be a proximate, not a remote cause of the damage.

But, the terms "proximate" and "remote" do not signify proximity or remoteness in point of time or place. Neither do they signify proximity or remoteness in a chain of successive causes and effects, unless that chain is broken by the intervention of some responsible human agent, or other independent and sufficient cause. There may be several causes and effects, and yet the first cause may be, in law, the proximate cause of the last effect. It is sufficient that there be an "ordinary and natural sequence," between the negligence and the damage. While the death in this case happened in a very strange manner, nothing could be more ordinary or natural than that the death of a passenger should ensue from such a destructive collision as that described in the declaration. The fact that the injury inflicted on Scheffer's brain passed through several phases before it finally caused his death, and that death finally ensued in an unforeseen manner, can no more relieve the railroad company from liability than if he had been injured in the arm, leg, or stomach, and the injured organ had passed through different stages of disease, ending in his death from some internal disturbance as the immmediate cause.

Wharton on Negligence, 76–78, 134–155.

Scott vs. Shepherd, 2 W. Bl. 892.

Sneesby vs. Lancashire and Yorkshire Railway Co. L. R. 9 Q. B. 263; affirmed, L. R. 1 Q. B. D. 42.
Insurance Co. vs. Tweed, 7 Wall. 44.
Insurance Co. vs. Seaver, 19 Wall. 531.
Grand Trunk R. R. Co. vs. Richardson, 91 U. S. 454.
Milwaukee R. W. Co. vs. Kellogg, 94 U. S. 469.
Cuff vs. R. R. 35 N. J. 17.

It cannot be said, in answer to the above, that the death of Scheffer was caused by a new and independent cause, namely, himself. The reply is that he was a lunatic,—made so by the negligence of the defendant. Idiots, lunatics, infants of tender years, persons intoxicated to a great degree, and persons acting under the impulse of sudden fright, are all incapable of being considered as juridical causes.

Least of all can the defendant escape responsibility where his own act has destroyed the free agency of another, and that other has, while in an irresponsible condition, committed the damage complained of.

Addison on Torts, 5, (1 Dudley and Baylies' Am. ed. 7.)
Wharton on Negligence, 87–96, 306.
Life Insurance Co. vs. Terry, 15 Wall. 580.
Dixon vs. Bell, 5 M. & S. 198.
Baltimore and Potomac R. R. vs. Reaney, 42 Md. 117.
Carter vs. Towne, 98 Mass. 567.
Vandenburgh vs. Truax, 4 Denio, 464.
Guille vs. Swan, 19 Johns. 381.
Pollett vs. Long, 56 N. Y. 200.

Suicidal mania is a well-defined disease, and when that disease is caused by a railroad collision, and death ensues, there is no more reason why the company should escape liability than in the case of any other disease.

Browne's Medical Jurisprudence of Insanity, Sec. 230 et seq.

JOHN B. SANBORN,
CHARLES KING,
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IN THE

Supreme Court of the United States.

No. 246.—October Term, 1881.

Albert Scheffer, George R. Finch, and Charles N. Nelson, Executors of Charles Scheffer, Deceased,

Plaintiffs in Error.

vs.

The Washington City, Virginia Midland and Great Southern Railroad Company,

Defendant in Error.

BRIEF OF LINDEN KENT,

For Defendant in Error.

J. L. Pearson, Printer, 9th and D sts., Washington.

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THE WASHINGTON CITY, VIRGINIA MIDLAND AND GREAT SOUTHERN RAILROAD COMPANY,
Defendant in Error.

No. 246.

Brief of LINDEN KENT, for Defendant in Error.

STATEMENT OF THE CASE.

This was an action brought by the plaintiffs in error, as executors of the estate of Charles Scheffer, deceased, against the defendant in error, the Washington City, Virginia Midland and Great Southern Railroad Company, for negligently causing the death of their testator.

Upon demurrer to the declaration, the court below sustained the demurrer, and the plaintiffs, by a memorandum in writing, filed in the suit, waiving their right to file an amended declaration, judgment was entered for the defendant, which judgment is now brought before this court for review.

The declaration sets out the following case:

On the 6th of December, 1874, Charles Scheffer, the testator, became a passenger on a sleeping-car attached to

the defendant's train, to be safely carried from Lynchburg, Virginia, to Washington, D. C. On the morning of the 7th of December a collision occurred with another train of the defendant, through the negligence of the defendant's agents, by means whereof the said Charles Scheffer was cut, bruised, maimed, &c., "and by reason whereof the said Charles Scheffer became and was sick, sore, lame, and disordered in mind and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced and caused upon the brain and mind of him, the said Charles Scheffer, which disease, superinduced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy, and prostrate the nervous system of him, the said Charles Scheffer, to wit, from the 7th day of December, A. D. 1874, to the 8th day of August, 1875, when said phantasms, illusions, and forebodings, produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him, the said Charles Scheffer, to take his life in an effort to avoid said phantasms, illusions, and forebodings, which he then and there did, whereby and by means of the careless, unskillful, and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to wit, on the 8th day of August, 1875, lost his life and died."

Argument.

I.

This action is brought under the Virginia statute (Code of Virginia, 1873, p. 996, ch. 145) which revives a cause of action in the name of the personal representative "whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation," &c.

The cause of action under this statute is the death of the party, as contradistinguished from those statutes in

force in some of the states, which make the loss of or sufferings of the decedent in his lifetime the cause of action.

In the State of Vermont there are two statutes, and where death occurs through negligence, &c., two causes of action may arise, one in favor of the decedent for his loss and sufferings in his lifetime and revived by act of November 15th, 1847; the other founded on his death and consequent injury to his heirs, under act of November 7th, 1849, which latter is almost identical with the Virginia statute. Both actions are to be prosecuted in point of form in the name of his personal representative, but the damages in the two suits are upon entirely different principles and for different purposes.

Needham vs. Grand Trunk R., 38 *Vermont*, 294.

It was contended below that this suit could be maintained under the Virginia statute for loss and sufferings as well as for death. A mere inspection of the statute discloses the error of this position, and the plaintiffs seem to have abandoned it in declining to file an amended declaration, which was necessary to properly set out the cause of action in this view.

Leaving out of consideration, then, any question relating to the cause of action founded on loss to the estate, or for the sufferings of the deceased, as inapplicable to this case, the doctrine expressed in the maxim *actio personalis moritur cum persona*, would apply but for the statute which revives the cause of action for the *death* solely.

II.

The only question to be considered, then, is—

Whether the wrongful act of the defendant was the proximate cause of the testator's death, resulting in the "ordinary and natural sequence" of events.

If it was, the declaration is good in law, and the judgment of the circuit court should be reversed.

If not, the declaration sets forth no cause of action, and the demurrer thereto was well sustained.

1. The general rule applicable to these classes of cases is—

That a wrong-doer is only liable for those consequences which are the natural and proximate result of the wrong complained of, and which may be reasonably expected to result under ordinary circumstances.

Lauter vs. N. Y. & Hud. Riv. R. Co., 66 N. Y., 50.
Lowery vs. W. U. Tel. Co., 60 N. Y., 201.
Wells vs. N. Y. Cent. R. Co., 24 N. Y., 187.
Saxton vs. Bacon, 31 Vermont, 546.

Another principle distinctly applicable to the question whether cause of damage was proximate or remote, is this:

Did the cause alleged produce the effect *without* another cause intervening, or was it made operative only through and by means of this operating cause?

3 Parsons on Contracts, p. 180.

Now, let us apply these general principles to the facts of this case.

The wrongful act of the defendant complained of was a railroad collision, whereby a passenger was injured, not killed. The act of the testator was the suicide of that passenger many months afterwards.

In the physical world these two acts can have no relation as cause and effect. It is not contended that any such exists. It is not contended that the death resulted from any bodily disorder or injury resulting from the accident. The death which followed as the result of the last cause, the testator's act, could not have resulted from the defendant's act. In a line of such successive events there couldn't be two proximate causes.

The physical act of the testator that resulted in his death was, it must be conceded, a sufficient cause, and was in point of fact the direct, immediate, and only cause of death. The act of the defendant is certainly very remote from this cause or its consequences.

In the chain of physical causes connected with the case, from the injury by the defendant to the death of the tes-

tator at his own hands, there is not only "no ordinary or natural sequence" between the acts of the defendant and the acts of the testator resulting in death, but there is no connection between them whatever. Suppose the act of the testator which resulted in his death had been the act of a sane man, it would never be contended that such an act was the effect of the defendant's act; and yet this is the true criterion to determine whether the acts and consequences are in natural sequence.

As was said In *Milwaukee R. Co. vs. Kellogg*, 94 *U. S.*, 475, "the question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

The damage which was proximate was the physical and mental injuries; these were the consequences of the accident, which was the proximate cause. If the "natural sequences" of these continuing injuries, without the interposition of any force or power, in itself a sufficient cause, had been the death of the party, then the death might have been the effect, of which the defendant's act was the proximate cause, and the defendant would have been liable.

But death was not the natural and reasonable result from these conditions; and in order that death should ensue, which constituted under the statute a new and independent cause of action for a new damage, the intervention of some other power or force was necessary.

Whether this new force or power, manifesting itself in a substantive act, the immediate result of which was death, emanated from a responsible or irresponsible agent or source, or from accident or design, is immaterial; for the necessity for the intervention of any act to accomplish the result is conclusive that there was no sufficient existing cause without such, and that death did not result in the ordinary sequence of events.

Physical causes, and the laws that govern the material world, are not to determine the defendant's liability, it is said.

In addition to the physical injuries inflicted by the defendant's act, the declaration sets out—

1. That by reason of the injury, the mind of the testator was disordered.

2. By means whereof, "phantasms, illusions, and forebodings of unendurable evils to come upon him, the said Charles Scheffer, were produced."

3. Resulted in prostration to the nervous system from the 7th day of December, 1874, to the 8th day of August, 1875.

4. When said "phantasms, illusions, &c.," prostrated all the reasoning power of the testator.

5. To avoid said "phantasms, illusions, and forebodings, &c.," the said testator was induced to take his life.

We have thus five distinct steps or stages, in a mental process or condition, to reach the effect which is the damage complained of here.

Whether or not they sustain the relation of "ordinary and natural sequence" to each other is a question, but it is contrary to all experience to say that death by suicide is the "ordinary and natural sequence" and proximate cause of an injury inflicted by a railroad collision.

To associate physical effects with mental conditions, in a chain of causes and effects, would be in violation of the principles applicable in ascertaining liability in such cases.

There would be no fixed rule for juries to determine whether the cause was proximate or remote, in cases where it was proper to leave the question with the jury.

If juries are permitted to take into consideration mental conditions as operating causes, then we are led into a new field of investigation. All the degrees of mental condition are legitimately considered. The motive that prompted action; as in this case, the motive that caused the suicide, was the apprehension of something worse than

death. Then, by a process of reasoning, they are asked to go back in the chain to find what inspired the motive.

It is too plain for argument, that, if this be so, the whole subject is relegated to the sphere of metaphysical reasoning, and the mental eccentricities of each member of the jury become in point of fact potent factors in the determination of the question of the mental condition of the party through whom the chain of cause and effect is traced.

It is urged, however, that the death of Scheffer was not caused by a new and independent cause, to wit, himself; because, being a "lunatic," he was incapable of being considered a "juridical cause," and that the defendant has destroyed his free agency, and that while in an irresponsible condition he had committed the damage complained of, therefore the defendant cannot escape the responsibility.

Granting that the act of the railroad company made a "lunatic" of Scheffer, what then is his legal status with respect of his being a "juridical cause"?

He comes to be subject to the laws of "material causation."—(Wharton Law of Neg., &c., 140.)

In the application of the laws of material causation, death was not the result.

It was not the proximate result. It was not what was reasonably expected to result under the circumstances.

The intervention of *any agency*—it may be material—prevents the plaintiffs from being able to prove that the defendant caused the act.

> *Bigelow's Leading Cases on the Law of Torts, p.* 608, *n.*

The lunacy of the testator was a *condition* and not a cause. Certain physical acts operated under the condition; the result was death.

Now, if one party produces wrongfully a *condition* of things upon which either an intelligent or material agency operates, resulting in damage, the party who produces the

condition which makes the damage possible, is not liable therefor.

Confusion frequently arises from the misuse of terms.

Remote cause is more accurately speaking no *cause* at all; but, as some times designated, more properly termed a *condition*. The only cause is the proximate cause, and the terms proximate and remote when applied to causation are not strictly speaking correct.

Bigelow's Ldg. Cases on Torts, p. 610, *n.*

In Insurance Co. vs. Sneed, 7 *Wall.*, 44, Justice Miller, delivering the opinion of the court, says: "One of the most valuable criteria furnished by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

Also, Milwaukee, &c., vs. Kellogg, 94 *U. S.*, 475.

Suppose that Scheffer had been languishing from the physical injuries received at the hands of the defendant railroad company, and though prostrate was yet convalescing, and in the ordinary course of time would have entirely recovered, yet while so prostrate and unable to protect himself on account of the wrongful act of the defendant, an irresponsible person, a lunatic, inflicts an injury from which he dies. It would hardly be contended that the railroad company was responsible for his death; and yet the cases on principle are the same, for in each case the railroad company produced the condition which made the damage possible; and in each case the direct cause of the injury complained of, was the act of an irresponsible person, who could not be a "juridical cause," therefore it is argued that the railroad can't escape the responsibility of its wrongful acts, which in each case resulted through the medium of an irresponsible person, in the injury complained of.

But it is contended that the conditions existing which induced the testator to take his life, to wit, the derangement of his mental faculties, and the destruction of his reasoning powers, were brought about by the act of the defendant, and hence the defendant's act is the proximate cause of the testator's death, for the condition of the testator, made so by the defendant, prevented him, or any act of his, from being a "juridical cause."

Pursue this doctrine to its logical conclusion, and we have the act of the defendant in injuring Scheffer the proximate cause of everything that he might thereafter do, and liable therefor; for it becomes the responsible party and liable for the acts of the irresponsible creature whose free agency it has destroyed.

That he killed himself instead of killing some one else does not change the nature of the liability.

If this "suicidal mania" had assumed a homicidal form, or developed into kleptomania, which at any time resulted in the taking of another's life or another's property, the railroad company would have been liable under the doctrine as insisted upon here.

The situation would be simply this: That the railroad company had created an irresponsible agent, over whom and whose acts it had no control, whose agency it could not revoke, with a continuing liability for its acts.

This is not a forced construction of the doctrine; for if we accept the definition of negligence from the brief of the counsel for the plaintiffs in error, which has discovered the "ordinary and natural sequence" between the negligence of the defendant and the death of the testator, and trace it through the conditions existing in this case, the death of some other person at the hands of a lunatic would have been the "ordinary and natural sequence," rather than his own destruction.

One whose wrongful act produces a *condition* which must and does, in the ordinary sequence of events, result in

damage to another, is liable therefor, and the *condition* is, accurately speaking, the *proximate cause* of the injury.

But if the damage was caused by any act of omission or commission under the conditions, then such act is the *proximate cause*.

If a party is suffering under a physical injury resulting from the wrongful act of another, which makes a surgical operation necessary, and such operation is performed in such a grossly negligent manner as to cause death, the surgeon who was guilty of gross malpractice, and not the party whose wrongful act made the operation necessary, is liable therefor.

Again, if the injured party refuses to submit to any of the necessary precautions suggested by his condition, and by gross neglect willfully subjects himself to influences and forces which, operating upon his peculiar condition, produce his death, his act of omission is the *proximate cause* of death, and not the act which produced the condition that made his neglect fatally operative.

The case of *Carter vs. Towne*, 103 *Mass.*, 507, illustrates this doctrine.

A boy buys powder of a merchant. His parents are subsequently aware that he has the powder, and fail to take it away from him. He uses it, and the damage results. Suit was brought against the merchant. *Held*, that the knowledge on the part of the parents that the child had the powder, and their failure to take it away from him, whereby he was permitted to use it, was the proximate cause of the damage, and not the sale by the merchant.

The merchant put it in the power of the child to injure himself, but when the parents knew that he had the powder, new duties were imposed upon them in regard to the protection of the child against the peculiar perils of powder.

So in the case at bar, when Scheffer became a "lunatic" through the wrongful act of the defendant, and could

no longer be a "juridical cause," his whole legal status was changed.

He then became subject to the laws of "material causation." He could have no will of his own. His relations to individuals and to public society were changed, and new duties and obligations were created, both upon the part of the state and his family, to protect him.

It is respectfully submitted that the rule "*causa proxima non remota spectatur*," in its proper application to the alalleged facts of this case, relieves the defendant from all liability.

LINDEN KENT,
For Defendant in Error.